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No. 04-1527

Supreme Court, U.S.
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In The
Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For A Writ Of Certiorari
To The Maine Supreme Judicial Court

BRIEF FOR THE INTERVENORS IN OPPOSITION

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QUESTIONS PRESENTED BY PETITIONER

1. Does the mere flow of water through an existing dam constitute a "discharge" under Section 401, 33 U.S.C. § 1341, of the Clean Water Act, despite this Court's holding last year in *Miccosukee* that a discharge requires the addition of water from a distinct body of water?

2. Does the State of Maine's expansive application of Section 401 conflict with the Federal Energy Regulatory Commission's comprehensive licensing authority over hydroelectric generating projects under the Federal Power Act, 16 U.S.C. §§ 791a *et seq.*?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are Petitioner S.D. Warren Company, the owner and operator of five hydroelectric projects on the Presumpscot River (the "Projects"), Respondent Maine Department of Environmental Protection ("DEP"), the state agency that issued the Section 401 water quality certification at issue, and Intervenors American Rivers and Friends of the Presumpscot River, who have been parties in this action at all stages of administrative and judicial review. Pet. App. 18, 21, and 37.

RULE 29.6 STATEMENT

American Rivers is a not-for-profit corporation organized in Washington, D.C. Friends of the Presumpscot River is a non-profit entity organized pursuant to the Maine Nonprofit Corporations Act, 13 M.R.S.A. §§ 101-1406. Neither entity has a parent company nor has either issued stock. Each is recognized as tax exempt under Section 501(c)(3) of the Internal Revenue Code.

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OPINIONS BELOW

The decision of the Maine Supreme Judicial Court ("SJC") is reported at *S.D. Warren Co. v. Board of Environmental Protection,* 2005 ME 27 (2005). Pet. App. 1-18. The decision of the Maine Superior Court (Pet. App. 19-34) is unreported.

JURISDICTION

The judgment of the SJC was entered on February 15, 2005. Pet. App. 1. The petition for a writ of certiorari was filed on May 12, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Petitioner owns seven dams on the Presumpscot River, which stretches just 27 miles from Maine's Sebago Lake to the Atlantic Ocean. Six of Petitioner's dams generate electricity by removing water from the Presumpscot, running that water through turbines, and then discharging that water back into the Presumpscot. In 2001, five of those dams (the "Projects") required new licenses from the Federal Energy Regulatory Commission ("FERC") in order to continue operating. Current operations of the Projects prevent the Presumpscot River from meeting its water quality standards.[1]

[1] The DEP made this finding, *see* Pet. App. 88-89, 106-107, 111-112, 116, and it was affirmed by three reviewing tribunals. Pet. App. 12, 25-33, and 49. Specifically, Petitioner's Projects significantly alter the

(Continued on following page)

Petitioner's Projects are licensed by FERC. Section 401 of the Clean Water Act ("CWA") requires that any applicant for a federal license whose operations "may result in any discharge into the navigable waters" obtain a certification from the affected state that such discharge will comply with state water quality standards. 33 U.S.C. § 1341(a)(1).

In 1999, Petitioner filed applications to renew the FERC licenses for its Projects that were to expire in 2001. As required by Section 401, Petitioner also filed applications with the Maine Department of Environmental Protection ("DEP") for water quality certification. As is routine with virtually all states in FERC relicensing procedures, Maine reviewed the impacts of Petitioner's Projects on the Presumpscot's ability to meet its water quality standards. The Maine DEP then issued its Section 401 certification in April 2003, with conditions that DEP determined were necessary to ensure that operation of the Projects will not continue to violate those water quality standards. Pet. App. 121-139. As required by the CWA and its own regulations, FERC incorporated Maine's Section

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chemical, physical and biological nature of the Presumpscot River by impounding the water above each of its dams, then removing the water from the river and running it through its turbines to generate electricity, and then discharging that water back into the Presumpscot River, often times leaving that portion of the riverbed just below the dam (known as bypass reaches) devoid of any water. The Maine Board of Environmental Protection found, and Petitioner did not contest, that Petitioner's Projects have caused long stretches of the natural river bed to be essentially dry and thus unavailable as habitat for indigenous populations of fish and other aquatic organisms; that the Projects have blocked passage of eels and sea-run fish to their natural spawning and nursery waters; that the Projects have eliminated the opportunity for fishing in long stretches of the river; and that the dams have prevented recreational access to and use of the river. Pet. App. 49.

401 certification and its conditions into the renewed licenses for the Projects ultimately issued to Petitioner. 33 U.S.C. § 1341(d); 18 C.F.R. § 4.34(b).

Petitioner unsuccessfully challenged the Maine DEP's Section 401 certification before the Board of Environmental Protection, Pet. App. 35-73, the Superior Court, Pet. App. 19-34, and the SJC, Pet. App. 1-18. Petitioner also unsuccessfully challenged the FERC licenses themselves which, based on the recommendation of FERC and other federal agency staff and independent of the Section 401 certification, incorporated into the licenses almost the same conditions as contained in the Section 401 certification. *S.D. Warren Co.*, Project Nos. 2897-003, 2932-003, 2941-002, 2931-002 and 2942-005. 105 F.E.R.C. ¶ 61,013 (2003) ("FERC's Multi-Project Order").

In its petition for writ of certiorari, Petitioner argues for the first time that this Court's decision in *South Florida Water Mgmt. Dist. v. Miccosukee Tribe,* 541 U.S. 95 (2004), supports its assertion that its Projects should be exempt from Section 401 because they do not result in any discharge into the Presumpscot River. Petitioner also asserts that Maine's Section 401 certification represents a "power grab" by Maine usurping FERC's broad authority under the Federal Power Act.

ARGUMENT

Summary

This Court should deny this petition for certiorari for three basic reasons. First, Petitioner's first question presented does not warrant this Court's review because

Petitioner failed to raise it below and it was not addressed by the SJC and the lower tribunals. Second, the SJC's decision is consistent with the decisions of this Court and other Courts of Appeals on Section 401's applicability to hydroelectric projects and the authority of states to condition Section 401 certifications. This Court's decision in *Miccosukee* is not applicable to Section 401 and thus the SJC's decision does not conflict with it. And third, the SJC's decision is consistent with the practice of state and federal regulatory agencies applying Section 401 to hydroelectric projects; that practice requires no clarification by this Court. Certiorari should therefore be denied.

1. Petitioner's First Question Presented for Review Fails, Procedurally and Substantively, to Meet the Standards for Granting Certiorari.

A. Petitioner's Failure to Raise or Address the First Question Presented Before the SJC Requires Denial of Certiorari.

Petitioner contends that the SJC's decision directly conflicts with this Court's decision in *Miccosukee*. Pet. 7-17. Although *Miccosukee* was decided on March 23, 2004, well before briefing (September 2, 2004) and oral argument (November 16, 2004) was complete in the SJC, Petitioner failed to even cite *Miccosukee,* never mind to argue its merits. As such, the application of *Miccosukee* to a Section 401 certification was not addressed by the SJC.

It is well established that this Court does not consider issues that were not raised or considered in the lower courts. *See Illinois v. Gates,* 462 U.S. 213, 218 n.1 (1982) ("the Court developed the rule that a claim would not be considered here unless it had been either raised or

squarely considered and resolved in state court"). Only in "very rare exceptions" will the Court examine claims not addressed below when reviewing state court judgments. *Yee v. City of Escondido,* 503 U.S. 519, 533 (1992).

There are no such exceptional circumstances to merit review of Petitioner's first question presented here. On this basis alone, certiorari should be denied.[2]

B. The SJC's Decision That Petitioner's Projects Result in a Discharge Under Section 401 Is Consistent With Prior Decisions of This Court and Courts of Appeals.

Just as Petitioner now attempts to manufacture an issue that merits this Court's review, it attempts to manufacture a conflict between the SJC's decision and prior decisions of this Court and courts of appeals. No such conflict exists. Rather, courts have consistently found that the operation of hydroelectric projects such as Petitioner's involve at least one discharge when the project returns water back into the river after using it to generate electricity; therefore the licensing of such projects triggers Section 401, just as the SJC found in this case.

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[2] As noted above, Petitioner's appeal of the FERC licenses themselves was recently and summarily rejected. Intervenor's Appendix ("Inter. App.") 1. As such, even if this Court were to grant this petition for certiorari and ultimately to agree with Petitioner's argument, in whole or in part, Petitioner would still have to operate its Projects under its FERC licenses, which incorporate almost all of the conditions contained in the Section 401 certification. *See* FERC's Multi-Project Order, ¶ 61,013; Inter. App. 2-7.

i. The SJC's Decision Does Not Conflict with *Miccosukee*.

Petitioner claims that the SJC's decision is "directly contrary to this Court's decision in *Miccosukee*" and that the SJC "erroneously ignored *Miccosukee*." Pet. 9, 13. Even if the Court were willing to overlook Petitioner's failure to even raise *Miccosukee* below, Petitioner's argument fails because it ignores the clear limits of *Miccosukee* and the fundamental difference between Section 401 and Section 402 of the CWA.

The issue addressed by the Court in *Miccosukee* was what constituted a "discharge of a pollutant" under Section 402 of the CWA. *Miccosukee*, 541 U.S. at 102-103. The Court's opinion did not address in any manner what constituted the more broadly and separately defined scope of "any discharge" under Section 401. 33 U.S.C. § 1362(16). As such, this Court did not address the distinction between Section 402's "discharge of pollutant" and Section 401's "any discharge." Moreover, because neither the legal nor factual issues in *Miccosukee* were suitably raised or developed below, the Court remanded without reaching any final decision on either issue. *Id.* at 112. In light of *Miccosukee's* substantive limitation to Section 402 and its procedural limitation of an undeveloped record, Petitioner's attempt to stretch the *Miccosukee* decision as one relevant to the SJC's decision of what constitutes "any discharge" under Section 401 should be rejected.

Moreover, Section 402 is fundamentally different than Section 401. The former's purpose is to regulate the discharge of pollutants to navigable waters by requiring a National Pollutant Discharge Elimination System ("NPDES") permit issued under Section 402 before "the

discharge of any pollutant by any person" to navigable waters is allowed. 33 U.S.C. §§ 1311(a), 1342. Section 401's purpose is quite different – to give states the ability to ensure that federally licensed projects (i.e., licensing that is not controlled by the state in which a project is situated) including hydroelectric projects will comply with the state's water quality standards. *See PUD No. 1 v. Washington Dep't of Ecology,* 511 U.S. 700, 707-08 (1994). Section 401's cooperative federalism approach to protecting and improving water quality is clearly broader than Section 402. That difference is reflected in how Congress limited Section 402's application to the "discharge of any *pollutant*" as opposed to Section 401's application to any federally licensed activity that "may result in *any discharge*." 33 U.S.C. §§ 1341(a)(1), 1342(a).

Miccosukee addresses only what constitutes a "discharge of a pollutant" under Section 402 and is therefore limited to the question of whether an NPDES permit is required for the activity in question. The SJC's decision addresses what constitutes "any discharge" under Section 401. As such, the conflict that Petitioner claims to exist between the SJC's decision and this Court's decision in *Miccosukee* is illusory.

ii. The Maine SJC's Decision Does Not Conflict With Other Decisions of This Court or Courts of Appeals.

The same illusory tension exists between the SJC's decision and the decisions cited by Petitioner. Specifically, each of the pre-*Miccosukee* cases that Petitioner claims the SJC decision conflicts with – *Nat'l Wildlife Fed'n v. Consumers Power Co.,* 862 F.2d 580 (6th Cir. 1988), *Dubois v. Department of Agriculture,* 102 F.3d 1273 (1st Cir. 1996)

and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 273 F.3d 481 (2nd Cir. 2001) – addressed whether an NPDES permit under Section 402 was necessary. None of them addressed Section 401 in general nor what constituted "any discharge" under Section 401 in particular. Thus, the interpretations of what constitutes an "addition" and thus a discharge of pollutants under Section 402 by these three Courts of Appeals are, like this Court's decision in *Miccosukee,* not applicable to what constitutes "any discharge" under Section 401.

Petitioner also tries to create tension between the cases that have addressed what constitutes "any discharge" under Section 401 and the SJC's decision. But its efforts to do so, which include all but ignoring this Court's decision in *PUD No. 1,*[3] are unavailing.

In *PUD No. 1,* the petitioner conceded that the hydroelectric project at issue would "at a minimum result in two possible discharges – the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity." *PUD No. 1,* 511 U.S. at 711. Although conceded, the issue was fully briefed to this Court. In its brief, petitioner described the operations of its run-of-river facility and concluded that "a discharge from a hydroelectric facility occurs when water is released or emitted that has been removed or blocked

[3] Petitioner's only cite to *PUD No. 1* is in a footnote and is to a portion of the dissent. Pet. 20 n.6.

from the flow of the stream." Brief for Petitioner, *PUD No. 1,* 1993 WL 632338 at *29.[4]

Similarly, the United States, having been invited by the Court to file an amicus brief, observed that "Congress employed the term 'discharge' when used without qualification (as in Section 401(a)) more broadly than the term 'discharge of any pollutant' which is used in a number of other provisions of the CWA," and concluded that a dam's release of water is a "discharge" that triggers § 401. Brief of the United States as Amicus Curiae Supporting Affirmance at 15 n.4. (1992 Lexis U.S. Briefs 1911.) Satisfied that Clean Water Act jurisdiction had been triggered, the *PUD No. 1* Court then proceeded to the merits.

Having ignored the *PUD No. 1* decision, Petitioner attempts to distinguish the decisions by the D.C. Circuit Court of Appeals since *PUD No. 1* that address what constitutes a discharge under Section 401, *North Carolina v. FERC,* 112 F.3d 1175 (D.C. Cir. 1997) and *Alabama Rivers Alliance v. FERC,* 325 F.3d 290 (D.C. Cir. 2003). Those decisions, though, are consistent with the acknowledgement in *PUD No. 1* that the discharge of water back

[4] Petitioner in *PUD No. 1* explained the basis for that conclusion in its brief as follows: "*The operation of a hydroelectric facility necessarily results in the discharge of water.* . . . In general, hydroelectric projects use the gravitational force of water as it moves down a stream from an upper to a lower elevation to drive a mechanical turbine that spins a generator, and thus produces electricity. The force of the falling water is exploited by a dam, or by a diversion structure like the Elkhorn Project's weir, that diverts water into a penstock, which then conveys the water down and into the turbine. *Water that has passed through the turbine is then returned to the stream somewhere below the powerhouse, through a conveyance known as a tailrace. Thus, hydroelectric facilities typically involve at least one discharge.* Brief for Petitioner, *PUD No. 1,* 1993 WL 632338 at *27-*28 (emphasis added).

into a river after it has been used to generate electricity triggers Section 401.

In *North Carolina,* the D.C. Circuit upheld FERC's ruling that an application to operate a pipeline that would withdraw water from the impounded portion of a river above a dam to use as drinking water would not result in "any discharge" and Section 401 certification was not required for the license amendment. *North Carolina,* 112 F.3d at 1187.[5] As support for its decision, FERC contrasted the proposed pipeline withdrawal with the discharge that is associated with the typical operations of a hydroelectric project:

> *The 'discharge' from the operation of the [hydroelectric] project is the water that leaves the project as it flows through a dam, or through penstocks, powerhouse turbines and tailraces, and reenters the river or some other waterway.*
>
> In a proceeding for a new license (relicense) of the project after the original license has expired, if no new facilities are proposed to be constructed, then the activity requiring certification is the continued operation of the project. *The place of discharge is the place at which project waters leave the project impoundment or bypass facilities and reenter the river or other waterway.*

[5] Initially, FERC ruled that Section 401 did not apply because FERC's regulations governing license amendments did not require Section 401 certification. *North Carolina,* 112 F.3d at 1172. The D.C. Circuit expressed "serious reservations" about FERC's attempt to redefine the statutory term "any discharge," but deferred addressing the issue because on appeal, FERC discarded the regulation as a basis for its decision. *Id.* at 1186.

Virginia Electric and Power Co., 77 F.E.R.C. ¶ 61,519 (emphasis added).[6]

The D.C. Circuit's subsequent decision in *Alabama Rivers* squarely addressed whether the flow of water through turbines constituted a discharge for purposes of Section 401. Specifically, the D.C. Circuit held that "an increase in the volume of water passing through the dam's replacement turbines may result in any discharge into the navigable waters within the meaning of [Section 401]." *Alabama Rivers,* 325 F.3d at 296-299.[7]

Collectively, the decisions in *PUD No. 1, North Carolina* and *Alabama Rivers* stand for the proposition that when a hydroelectric project removes water from a river, uses it to generate electricity and then returns that water to the river, there is a discharge for purposes of Section 401. In the case below, the Maine SJC concluded that "water that leaves the river and runs through the dam before returning to the river constitutes a discharge for the purposes of [Section 401]." Pet. App. 10. That conclusion is entirely consistent with the decisions in *PUD No. 1,*

[6] Underscoring this analysis by FERC is the fact that the very same licensee who in *North Carolina* vigorously opposed the applicability of Section 401 in the context of a license amendment to withdraw water did not contest Section 401's applicability a few years later when it sought to renew its license from FERC. Like the petitioner before this Court in *PUD No. 1,* the licensee, Dominion North Carolina Power, fully acquiesced that water flowing through its turbines and discharged downstream constituted a "discharge" triggering the Section 401 certification process. Int. App. 8-20.

[7] As did the court in *North Carolina,* the *Alabama Rivers* court expressed serious reservations about FERC's argument that "any discharge" and "discharge of any pollutant" are one and the same but did not address the issue because FERC failed to properly present it for review. *Alabama Rivers,* 325 F.3d at 298 n.11.

North Carolina and *Alabama Rivers*. Moreover, nothing in the SJC's decision applying Section 401 conflicts with the decisions applying Section 402 in *Consumers Power, Catskill Mountain* or *Dubois*. Accordingly, there is no conflict that merits granting certiorari.

iii. The Application of Section 401 Requires No Clarification From This Court.

Petitioner's claim that without this Court's clarification there will continue to be uncertainty as to what constitutes "any discharge" under Section 401 is as manufactured as the claim of conflict between the SJC's decision and decisions of this Court and other courts of appeals. Simply put, there is no uncertainty among the courts or the regulatory agencies as to the legal test to apply in determining whether a licensed activity "may result in any discharge."

Courts and regulatory agencies have all recognized that Section 401's use of the phrase "any discharge" is broader and more inclusive than Section 402's use of the phrase "discharge of any pollutant" such that "any discharge" includes, but is not limited to, the discharge of a pollutant. *See, e.g., Power Authority of New York v. Williams*, 101 A.D.2d 659, 660 (1989) ("This broad definition of the word 'discharge' and its application to 'any discharge' in [Section 401] requires that we reject petitioner's fundamental argument, i.e., that for section 401 to apply, a discharge must contain a specific and identifiable pollutant."); *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) ("'Discharge' is the broader term because it includes all releases from point sources, whether polluting or nonpolluting."); *City of Augusta, Georgia*, 109 F.E.R.C. ¶ 62,210 ¶ 11 (2004) ("As defined in

the CWA, the term 'discharge' includes a 'discharge of a pollutant,' and thus the former term comprises a broader class of activities than the latter."); and Pet. App. 35, 41 (finding by Maine Board of Environmental Protection that, consistent with position of U.S. Environmental Protection Agency, "any discharge" as used in Section 401(a) is broader than "discharge of pollutants.")

Thus, in determining if an activity "may result in any discharge," courts and regulatory agencies uniformly agree that there must be some release, addition or flow from the licensed activity to the navigable water. *See, e.g., PUD No. 1*, 511 U.S. 700, 711 (no dispute among FERC, State of Washington, EPA and owner of hydroelectric project that release of water at end of tailrace constitutes discharge under Section 401); *In re Central Vermont Pub. Serv. Corp.*, 85 F.E.R.C. ¶ 61,410, 62,557 (1998) (a "discharge" from the operation of a hydroelectric project is the water that leaves the project as it flows over or through a dam, or through penstocks, powerhouse turbines and tailraces, and reenters the river or enters some other waterway); *City of Fort Smith*, 42 F.E.R.C. ¶ 61,362 at 62,047 (1988) (same). Accordingly, there is no legal issue this Court needs to clarify that merits granting certiorari.

2. The Second Question Presented By Petitioner Does Not Present A Conflict Or Controversy That Merits This Court's Review.

No dispute exists in this case or in the courts below concerning either FERC's exclusive licensing authority over hydroelectric projects, *California v. FERC*, 495 U.S. 490 (1990) or states' authority to certify with conditions that such projects meet applicable water quality standards. *See PUD No. 1*, 511 U.S. at 707-08. That question

was explicitly addressed and resolved by this Court's decision in *PUD No. 1.* In addition, there is no dispute or confusion as to the application of Section 401 to the licensing of hydroelectric projects, as set forth above. As such, there is no legal or factual dispute which merits certiorari as to the second question presented.

Substantively, Petitioner's argument ignores the system of cooperative federalism created by the CWA, and specifically Section 401, that gives states a clear and defined role in enforcing water quality standards within the state. 33 U.S.C. § 1341(d); 18 C.F.R. §§ 4.38(f)(7), 16.8. As this Court held in *PUD No. 1*, a state may place conditions on the activity as a whole that are necessary to meet state water quality standards. 511 U.S. at 712-719. In making this conclusion, this Court also ruled that Section 401 did not interfere with FERC's exclusive licensing authority. *Id.* at 721-22.

Because the SJC's decision is consistent with the language of the CWA and FERC's regulations and this Court's decision in *PUD No. 1*, it is difficult to discern what Petitioner is asking this Court to review. At best, Petitioner's argument is a fact-bound issue that does not warrant this Court's review. Certiorari should be denied as to Petitioner's second question presented.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1105 September Term, 2004

S.D. Warren Co.,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent.

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

Before: GINSBURG, SENTELLE and HENDERSON, *Circuit Judges*.

JUDGMENT

(Filed May 6, 2005)

This cause was heard on the record from the Federal Energy Regulatory Commission and on the briefs and arguments by counsel. For the reasons set out in the accompanying memorandum, it is

ORDERED that the petition for review is denied.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of

any timely petition for rehearing or rehearing en bane. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
/s/ Mark J. Langer
Mark J. Langer, Clerk

S.D. Warren Co. v. FERC, No. 04-1105

MEMORANDUM

The Federal Energy Regulatory Commission (FERC or Commission) issued a series of orders granting licenses to S.D. Warren Company (Warren) to operate and maintain five hydroelectric projects on the Presumpscot River in the State of Maine. *S.D. Warren Co.*, Project Nos. 2897-003, 2932-003, 2941-002, 2931-002 and 2942-005, 105 FERC ¶ 61, 013 (2003) (Multi-Project Order); *S.D. Warren Co.*, Project No. 2931-002, 105 FERC ¶ 61,010 (2003); *S.D. Warren Co.*, Project No. 2932-003, 105 FERC ¶ 61,011 (2003); S.D. *Warren Co.*, Project No. 2941-002, 105 FERC ¶ 61,012 (2003); and, *S.D. Warren Co.*, Project No. 2942-005, 105 FERC ¶ 61,009 (2003). Pursuant to the terms of the Federal Power Act (FPA), 16 U.S.C. §§ 792 *et seq.*, the FERC attached conditions to the licenses to protect environmental and recreational interests affected by Warren's hydroelectric projects. The conditions included fishway prescriptions filed by the Department of Interior (Interior) under § 18 of the FPA, *id.* at § 811, that required Warren to install eel ladders at each project dam to facilitate upstream migration by American eel and mandated an eight-hour shutdown of the project turbines for an eight-week period in the fall of each year to protect downstream eel migration. Multi-Project Order, 105 FERC at 61,138,

¶¶ 42-43. Interior also placed conditional obligations on Warren to provide upstream and downstream fish passage facilities at each project dam as fish passage is achieved at the next most downstream dam. *Id.* at 61,137-38, ¶¶ 35-41. Specifically, if fish passage is achieved at a downstream dam not controlled by Warren over which the FERC lacks jurisdiction, within two years Warren is required, *inter alia*, to construct denil fish ladders at its most downstream dam. *Id.* at 61,137, ¶ 36. Construction of fish passage facilities at each of Warren's upstream dams is conditioned on the attainment of specific fish population triggers at the next downstream dam. *Id.* The FERC also attached conditions imposed by the State of Maine pursuant to the state water quality certification (WQC) process under § 401 of the Clean Water Act, 33 U.S.C. § 1341(d). Maine's WQC conditions imposed, *inter alia,* dissolved oxygen standards and minimum bypass flows (intended to mitigate the dewatering of the Presumpscot River spillways below each project) and required Warren to develop a recreational facility enhancement plan for each project. *See* Multi-Project Order, 105 FERC at 61,136, ¶ 25. In addition, pursuant to § 10(a) of the FPA, 16 U.S.C. § 803(a), the Commission imposed conditions designed to ensure that the projects would "be best adapted to a comprehensive plan for ... the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including ... recreation[]." *Id.* at § 803(a)(1). Based on the Final Environmental Impact Statement (FEIS) issued by the Commission staff on June 26, 2002, the FERC required Warren, *inter alia,* to develop a Shoreline Management Plan (SMP) for its two largest projects with a shoreline buffer zone of 200 feet. Multi-Project Order, 105 FERC at 61,141-42, ¶¶ 64-66. The

FERC also required Warren to monitor and report on recreational use near the project sites every 12 years. *Id.* at 61,149-50, Article 409. The FERC issued the licenses *for* a 40-year term. *Id.* at 61,144, ¶ 86.

Warren petitioned the Commission for rehearing: On rehearing, the FERC upheld the orders with respect to the license requirements which it had included and denied rehearing as to the § 18 and § 401 conditions, concluding that it had no authority to revise or remove those provisions from the licenses. *S.D. Warren Co.*, Project Nos. 2897-005, 2931-004, 2932-006, 2941-004, and 2942-007, 106 FERC ¶ 61,087, 61,293-94, ¶¶ 3, 4, 7, 11-14, 16 & nn. 7-8, 13 (issued January 29, 2004) (Rehearing Order). *See Bangor Hydro-Elec. Co. v.* FERC, 78 F.3d 659, 663 (D.C. Cir. 1996) ("[I]t is not the Commission's role to judge the validity of Interior's position – substantially or procedurally."); 33 U.S.C. § 1341(d) ("Any certification provided under [§ 401] . . . shall become a condition on any Federal license or permit subject to the provisions of this section."). *See also Alabama Rivers Alliance v. FERC,* 325 F.3d 290, 292-93 (D.C. Cir. 2003) (same).

Warren challenges the sufficiency of the evidence in the record to support the Commission's § 10 conditions and Interior's § 18 prescriptions. Warren also challenges the 40-year license term as arbitrary and capricious. We uphold the Commission's orders because they are supported by substantial evidence in the record, 16 U.S.C. § 8251(b), and because the Commission "examined the relevant data and provided a reasoned explanation supported by a stated connection between the facts found and the choice made." *North Carolina v. FERC,* 112 F.3d 1175, 1189 (D.C. Cir. 1997) (internal quotation marks omitted). The conditions imposed by the Commission under § 10 are

supported by substantial evidence. The FEIS upon which the Commission relied considered the comments of several entities, including the FWS and National Park Service, as well as the Maine Department of Marine Resources, the Maine Atlantic Salmon Commission, the Maine Department of Inland Fisheries and Wildlife and three individuals. *See* Multi-Project Order at 61,135, ¶ 18 & n.5. The Commission altered the scope of the conditions recommended by the FWS, reducing the 500-foot buffer zone for the SMPs to 200 feet and decreasing the reporting requirement for recreational use studies from every six years to every 12 years, because the FWS had failed to provide sufficient evidence to support its more stringent recommendations. *Id.* at 61,141-42, ¶¶ 64-66.

With respect to Warren's challenge to Interior's fishway prescriptions under § 18, we apply the same arbitrary and capricious standard that governs the actions of the Commission. *Wisconsin Power & Light Co. v. FERC,* 363 F.3d 453, 461 (D.C. Cir. 2004). Interior's fishway prescriptions must be "reasonably related" to its goal of fish preservation. *Bangor Hydro-Electric*, 78 F.3d at 663. The scientific evidence in the record demonstrates significant populations of American eel and a 2000 study of the Presumpscot projects commissioned by Warren documents the extent to which the project dams impaired the ability of the eels to migrate upstream due to difficulty ascending dam faces. Studies of similar projects demonstrated the hazards of downstream migration, specifically, high mortality rates caused by project turbines. Interior's prescriptions are reasonably calculated to mitigate these harms. The required eel passageways provide for efficient upstream migration at a "relatively low cost," according to the FEIS. Interior's requirement that Warren shut down

turbine operation for a period of eight hours per day for eight weeks during peak migration is likewise a reasonable prescription. Interior reasonably concluded that current scientific evidence does not permit a reliable estimate of a shorter peak migratory period that would ensure similar protection of the eel with a less stringent shutdown requirement. Interior has directed Warren to conduct a three year study of migratory patterns, the results of which may enable Interior to reduce the 8/8 requirement without proportionally increasing the risk to migrating eels. Likewise, Interior's prescriptions with respect to anadromous fish species are reasonable. The fish passageway requirements are conditioned on restoration of the relevant species to the areas below each project. In the absence of species restoration, Warren need not undertake any construction based on the prescription. The target levels for fish population that trigger action, roughly 20 per cent of the maximum estimated population size, are reasonably calculated to ensure that Warren need not undertake construction at its upstream projects unnecessarily.

The conditions imposed by the FERC require Warren to undertake a "moderate amount of construction and environmental mitigation and enhancement measures." *See* Multi-Project Order at 61,144, ¶ 86. The record evidence supports the Commission's assessment. More extensive construction that might be required under Interior's conditional fishway prescriptions could, if actually imposed, provide a basis for extending the license term. Until that time, the 40-year license term, instead of the 50-year license Warren had sought for "extensive" construction, cannot be considered arbitrary or capricious.

M.G. Deacon, Jr.
Vice President
[Illegible] & Hydro

Dominion Generation
Innsbrook Technical Center
5000 Dominion Boulevard, Glen Allen, VA 23060

[LOGO]

August 26, 2003

Ms. Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

FERC PROJECT NO. 2009
ROANOKE RAPIDS AND GASTON
HYDROPOWER PROJECT
NORTH CAROLINA CWA
SECTION 401 CERTIFICATION

(Filed Aug. 27, 2003)

Dear Ms. Salas:

Virginia Electric and Power Company, doing business as Dominion Virginia Power (Dominion) is working with FERC staff to complete the record for the license renewal for Roanoke Rapids and Gaston, project no. 2009. Attached you will find the State of North Carolina's CWA Section 401 Certification for the project.

If you have any questions related to this submittal, please call Jim Thornton (804) 273-3257.

Sincerely,

/s/ M G D J
M. G. Deacon, Jr.

Attachment

cc: Mr. Allan Creamer, FERC, Washington, DC

[LOGO] [Names Omitted In Printing]

July 30, 2003

(Filed Aug. 27, 2003)

Mr. Malcolm G. Deacon, Jr. Vice President –
Fossil and Hydro
Dominion Energy and Dominion Generation
Innsbrook Technical Center
5000 Dominion Blvd.
Glen Allen, VA 23060

Dear Mr. Deacon:

Re: Certification Pursuant to Section 401 of the Federal Clean Water Act for the Roanoke Rapids and Lake Gaston FERC Relicensing Project
WQC Project #02-0919
FERC Number 2009
Halifax County and adjacent counties

Attached hereto is a copy of Certification No. 3208 Issued to Dominion North Carolina Power dated July 30, 2003. If we can be of further assistance, do not hesitate to contact us.

Sincerely,

/s/
Alan W. Klimek, P.E. Director

Attachments

cc: Raleigh and Washington DWQ Regional Offices
Doug Huggett, Division of Coastal Management
File Copy
Central Files
Darlene Kucken; DWQ Basinwide Planning Program Unit
Jim Mead, NC Division of Water Resources

Marc Bernstein, NC Attorney General's Office
Robin Smith, DENR
Thomas Leahy, Ill P.E., City of Virginia Beach, VA
Jean McCarter, Lake Gaston Association
Bob Lindsay, Roanoke River Basin Association
Garland Pardue, US Fish and Wildlife Service – Raleigh
David Rackley, National Marine Fisheries Service, Charleston, SC
Shannon Denton, NC Wildlife Resources Commission
Ron McKittrick, Federal Energy Regulator Commission
Sara Winslow, NC Division of Marine Fisheries
Bud Laroche, Virginia Department of Game and Inland Fisheries
Rheta Geddings, SC Department of Health and Environmental Control
Ellen Gifinsky, VA Water Control Board, Wetlands Program
Joseph Hassell, VA Department of Environmental Quality

NORTH CAROLINA 401 WATER QUALITY CERTIFICATION

THIS CERTIFICATION is issued in conformity with the requirements of Section 401 Public Laws 92-500 and 95-217 of the United States and subject to the North Carolina Division of Water Quality ('DWQ') Regulations in 15 NCAC 2H, Section .0500. It is issued to Dominion North Carolina Power ("the applicant") in Halifax County and adjacent counties pursuant to a revised application filed on the 20th day of November, 2002 to, among other things, retain the Gaston and Roanoke Rapids dams across the Roanoke River.

The application provides adequate assurance that the retention of fill material into the waters of the Roanoke River in conjunction with retention and operation of these dams and other project activities will not result in a violation of applicable Water Quality Standards, discharge guidelines and other applicable State laws. Therefore, the State of North Carolina certifies that this activity will not violate the applicable portions of Sections 301, 302, 303, 306, 307 of PL 92-500 and PL 95-217 if conducted in accordance with the application and conditions hereinafter set forth.

This approval is only valid for the purpose and design that you submitted in your application, as described in the revised application. If you change your project, you must notify us and may be required to send us a new application for a new Certification. If the property is sold, the new owner must be given a copy of the Certification and approval letter and is thereby responsible for complying with all conditions. For this approval to be valid, you must follow the conditions listed below. The issuance of this Certification shall not exempt the applicant from complying with any and all statutes, rules, regulations, or ordinances that may be imposed by other government agencies (local, state and federal) which have jurisdiction, including but not limited to applicable river buffer rules in 15A NCAC 2B .0200, erosion and sedimentation control requirements in 15A NCAC Chapter 4 and under the Division's General Permit NCG010000, and any requirements pertaining to wetlands under 15A NCAC 2B .0200, 15A NCAC 2H .0500 and 15A NCAC 2H .1300. This Certification is issued on the express representation by the applicant that the Settlement Agreement referenced herein has been executed by all necessary signatories and therefore is

in effect. If the Settlement Agreement is not in effect as of July 30, 2003 then this Certification may be modified by DWQ in order to coincide with the relevant provisions of that Settlement Agreement.

Condition(s) of Certification:

1 Flow In the Bypass Reach –

1.1 Flow of water in the bypass reach shall not be less than 325 cfs at any time except as modified by future adaptive management studies as approved in writing by DWQ. The adaptive management studies shall focus on the spawning window (at least March 15 through June 15). However, slight reduction in flows in the winter months may be approved, but shall not result in minimum flows less than 300 cfs. The flow shall be released from both the north and south ends of the dam so that it is evenly distributed into the reach. The precise schedule for release may be developed in consultation with the Cooperative Management Team ("CMT") consisting of representatives of the NC Department of Environment and Natural Resources ("DENR"), NC Wildlife Resources Commission ("WRC"), US Fish and Wildlife Service ("USFWS"), National Marine Fisheries Service ("NMFS") and the applicant.

1.2 The applicant shall provide on a periodic basis for the duration of 24 consecutive hours, flow to the bypass reach of 500 cfs ("freshet flow") on a schedule provided by DWQ in consultation with WRC. The scheduling of the 500-cfs flow may be on weekends in order to minimize the cost of hydropower losses.

1.3 The applicant shall follow an annual schedule provided by DWQ upon consultation with WRC to the applicant by November 30 for the following year. The annual scheduling of the 500-cfs may not exceed a total of 17 days of the freshet flows. After the annual schedule has been provided to the applicant, DWQ may modify the schedule in consultation with WRC but shall give the applicant a minimum of 10 days notice prior to modification of the 500-cfs scheduling. Whenever flood flows require opening of the Roanoke Rapids darn floodgates for at least one 24-hour period and up to 21 days, this will count as one of the 500-cfs flow days. (A 22 to 42-day flood release would count as two freshet flow days, etc.) If, during a study cycle, the flow for a period of 21 days equals or exceeds 500 cfs, the number of freshet flows required for that year will be reduced by one. The applicant shall provide to DENR and WRC by March 31 of the following year, a report that lists the days that the 500 cfs freshest flow was passed into the bypass reach. Consistent with article FL1, section 4 of the Settlement Agreement, during cycles two, three and four of the bypass reach study, the annual scheduling of the 500-cfs may not exceed a total of 13 days of the freshet flows.

1.4 The applicant shall reduce flood flow releases at the Roanoke Rapids dam from 35,000 cfs (or any flow greater than 5,000 cfs through the floodgates) to 25,000 cfs in consultation with the US Army Corps of Engineers ("USACE"). Once the flood releases through the Roanoke Rapids floodgates are reduced to 5,000 cfs, the applicant shall reduce the flows in the bypass reach per the rates in Table 1 below:

Table 1	
Hour	Release (cfs)
0	5,000
4	4,000
8	3,000
12	2,000
16	1,500
20	1,000
24	700
28	500
32	325

If flood releases occur but do not reach 5,000 cfs through the floodgates, the table above shall still be used starting at the maximum flood release. The bypass reach flow may be temporarily modified if required by unusual circumstances upon written agreement between the DWQ and the USACE and in consultation with the Licensee and the WRC. Temporary changes will be coordinated with the other agendas of the CMT in a timely manner.

1.5 If DWQ, in consultation with the CMT, delays Implementation of this condition to allow for the collection of baseline data, Implementation shall begin as determined by DWQ. If the implementation of this condition is not so delayed, then the applicant shall begin releasing water into the bypass reach within one week of acceptance of the new license for Federal Energy Regulatory Commission Project No. 2009 ("new FERC license").

1.6 The applicant, in consultation with the CMT, shall conduct the study described in article FL1, section 4 of the Technical Settlement (Appendix B) of the Settlement Agreement. Consistent with such article, the applicant shall not

adopt a new flow regime for the bypass reach without written approval from DWQ.

2 **Minimum Releases from the Roanoke Rapids dam** – The following schedule shall be followed for the minimum release of water from the dam. "Declaration" refers to the daily mean of the USACE weekly declaration. The applicant shall implement this new flow regime within 30 days of acceptance of the new FERC license.

2.1 – Minimum and Target Flow Releases from Roanoke Rapids Dam		
Timeframe	**Condition**	**Minimum Flow**
Jan. 1-15	Declaration < 6000 cfs	2000 cfs
	Declaration ≤ 6000 cfs	2500 cfs
Jan. 15-Feb. 28/29	Declaration < 6000 cfs	2500 cfs or declaration, whichever is less
	Declaration ≥ 6000 cfs	3000 cfs
March	Declaration ≤ 3500 cfs	minimum flow = Declaration
	Declaration > 3500 cfs	minimum flow = 3500 for peaking days
		5 peaking days during month
		3 peaking day limit per week
		3 consecutive peaking day limit
		Can only peak in two of the weeks
	Ramp up	Ramp up from min. by 5000 cfs hold for 1 hour, then go to full load

	Ramp down	Ramp down to min. flow + 5000 cfs, hold for one hour then go to minimum flow.
April 1-June 15	All conditions	Flow = mean of weekly declaration, no peaking
	Ramp	Change from one to next weekly declaration cannot exceed 5000 cfs per hour
June 16-June 30	All conditions	2800 cfs or declaration, whichever is less
July 1-September 15	All conditions	2000 cfs
Sept. 16-Nov. 15	All conditions	1500 cfs
Nov. 16-Nov. 30	All conditions	2000 cfs
Dec. 1-Dec. 31	Declaration < 6000 cfs	2000 cfs
	Declaration ≥ 6000 cfs	2500 cfs

2.2 When the USACE declares a drought, the applicant shall maintain the following drought minimum flows unless otherwise directed by the USACE in consultation with DWQ and WRC:

Table 2

January – August	2000 cfs
September – November	1500 cfs
December	2000 cfs

2.3 Transition from Flood Control to Normal Hydropower Operations –

The applicant shall work in conjunction with the USACE to gradually reduce flows in the bypass reach per the schedule described in Condition 1 of this Certification. Following USACE

flood control releases from the Roanoke Rapids dam, the applicant shall work in conjunction with the USACE to reduce flows in the mainstream river gradually during the months of May through September to minimize the effects of inflow of water with low oxygen levels into Roanoke River from downstream wetlands. Upon agreement with the USACE and in consultation with DWQ, the applicant shall implement the following step-down schedule from a 20,000-cfs flow:

Table 3

Hour	Flow (cfs)
0	17,000
8	14,000
16	12,000
20	11,000
24	10,500
28	10,000
32	9,500
36	9,000

This schedule may be revised upon written request to DWQ if the ongoing USACE section 216 study indicates a different step-down schedule should be followed.

Table 3, above, represents a maximum flow reduction schedule. A slower step-down schedule (one that reaches the 9000 cfs flow over a longer period of time) may be approved by the USACE in consultation with DWQ and the applicant on a case by case basis. During the time-frame needed to execute the flow reduction schedule, the applicant would not engage in load-following operations. The applicant shall implement the step-down flow schedule beginning

when the applicant has accepted the new FERC license.

3 Downstream Water Quality –

3.1 Minimum Flow – Minimum flows to address downstream uses are discussed in Condition 2 of this Certification.

3.2 *Erosion and Sedimentation* – The applicant shall develop a plan to monitor the effect of within-day peaking on benthic macroinvertebrates, fish communities and stream bank erosion along the Roanoke River downstream of the Roanoke Rapids dam. The development of that plan shall be in cooperation with a CMT consisting of WRC, DENR, USFWS, NMFS, the Nature Conservancy ("TNC"), and the applicant, with the Regional Partnership of Local Governments ("RPLG") as an ex officio member. Monitoring cycles shall consist of five-year periods beginning when the applicant accepts a new FERC license. The applicant shall be required to fund the cost of Implementing the monitoring plan up to the amount of $30,000 annually (2002 dollars adjusted according to the Consumer Price Index). Any portion of the $30,000 not utilized shall be carried forward to the Licensee's future annual budget cycles and shall be in addition to the $30,000 allocated for that cycle. In the thirtieth year of the license, the Licensee shalt consult with the GMT to determine if an increase in funding of the monitoring program is appropriate. Within one year of the acceptance of the new FERC license, the applicant shall transmit the plan to DWQ for written approval and subsequent implementation by the applicant. If DWQ does not provide written comments to the applicant within 60 days of

receipt of this plan, then the plan may be Implemented as submitted. During the first monitoring cycle, data collection shall not be required to start until year two to allow for development of the monitoring plan and protocols.

DWQ, in consultation with the CMT, will review monitoring data at the end of each cycle to determine if it establishes a link between the applicant's within-day peaking and (a) erosion of the banks of the Roanoke River downstream of the Roanoke Rapids dam and/or (b) negative effects on downstream benthic macroinvertebrate or fish species and communities. If such a link is established, then DWQ – in consultation with the CMT – will develop an approach that requires the applicant to address those effects by modifying one of the following: maximum peaking flow; difference between base flow and peak flow on peaking days; ramping rates; duration of base flow (in hours) between peaking releases; modification of the definition of a peaking period in condition 8 of this Certification; or some other modification that the CMT suggests might reduce adverse impacts of within-day peaking on aquatic biota and/or stream bank stability. Seasonal variations may also be incorporated in this approach. Upon written notice of the development and written approval from DWQ for this approach, the applicant shall Implement this approach.

If subsequent monitoring indicates a continuing link between within-day peaking operations and bank erosion and/or negative effects on downstream aquatic species and immunities, then DWG – in consultation with the CMT – will develop an additional Incremental modification from the [sic] those listed in the paragraph

above that the applicant must implement to further reduce those effects. Upon written notification of any additional incremental modification, and so long as such modifications reduce the latitude available to the applicant for within-day peaking by a proportional amount equivalent to 5 divided by the period of the new FERC license in years, the applicant shall implement such modification. The exact means for calculating the proportionality of steps will be determined by DWQ in consultation with the CMT. If any operational changes subject to this section (3.2) would conflict with release requirements subject to sections 2, 3.4 or 3.5 of this Certification, then the flow-related conditions of these other sections shall take precedence.

3.3 *Minimum Oxygen Releases from the Roanoke Rapids Dam* – Water flowing through the hydropower turbines from the Roanoke Rapids dam shall meet or exceed the Instantaneous dissolved oxygen standard in effect as of the date of the discharge. The Instantaneous dissolved oxygen standard as of the date of this Certification is 4.0 mg/L (ppm) (15A NCAC 2B .0211(3)(b)).

Water flowing through the hydropower turbines from the Roanoke Rapids dam shall meet or exceed the mean, daily dissolved oxygen standard in effect as of the date of the discharge. The mean, daily dissolved oxygen standard as of the data of this Certification is 5.0 mg/L (ppm) (15A NCAC 2B .0211(3)(b)). The daily mean oxygen concentration shall be calculated as the mean of all instantaneous analyses collected in a 24-hour period to be no less than 24, hourly measurements. If dissolved oxygen concentrations

immediately upstream of the project do not meet or exceed the instantaneous dissolved oxygen standard and mean, daily dissolved oxygen standards in effect as of the date of the discharge, then the Raleigh Regional Office of DWQ shall be notified in writing and via telephone. In any case, the dissolved oxygen in the water flowing through the hydropower turbines from the Roanoke Rapids dam shall equal or exceed the upstream dissolved oxygen concentration.

Oxygen concentrations shall. be measured in the tailrace.

Within six months of the applicant's acceptance of a new FERC License, the applicant shall submit a draft agreement to DWQ regarding the location of the sampling point upstream of the project if the dissolved oxygen water quality standard is not met in the tailwaters below Roanoke Rapids dam, then the applicant shall begin sampling for dissolved oxygen levels within two business days in Lake Gaston and in the tailwaters below Lake Gaston.

Data from the Roanoke Rapids monitoring shall be maintained on a real-time basis via Internet and forwarded to the Wetland/401 Unit, the Ecosystems Unit and the Raleigh and Washington Regional Offices of DWQ every other month from November 1 through May 31 and monthly from June 1 through October 31. Data must be submitted electronically and DWQ shall be notified in writing that the data have been sent. Data must include Flow (cfs), Dissolved Oxygen concentrations (mg/L) and Water Temperature (°C).

In the event of temporary emergency conditions arising in the performance of the above conditions, the applicant shall cooperate in good faith with DWQ and WRC to take such reasonable steps to protect the water quality of the Roanoke River below the Gaston and Roanoke Rapids dams.

3.4 *Flow Augmentation from Lake Gaston Storage during Drought Conditions* – Conditions requiring flow augmentation from Gaston storage:

If all four of the following conditions are met, the applicant shall begin augmenting downstream flows from the Lake Gaston storage in consultation with DWQ and WRC.

a) USACE is operating Kerr reservoir under its drought management strategy,

b) Roanoke Rapids dam is not in a hydropower peaking mode and is only releasing drought minimum flows as directed by the USACE drought management strategy or when condition 2.2 is in effect,

c) A weekly declaration from USACE is issued that is less than the total of drought minimum flow required at the Roanoke Rapids dam, and

d) Lake Gaston water level is above 197' msl.

Lake Gaston storage – Lake Gaston normal water level shall be regulated by the applicant: in order to maintain the existing uses of the lake with the following provisions. if all of the drought storage is used for downstream flow augmentation, then the applicant shall regulate Lake Gaston from 197.5' msl to 196.5' msl, in

order to meet system operational needs with the following provisions:

a) For the purpose of flow augmentation downstream under the conditions listed above, Lake Gaston has 3 feet of drought storage.

b) Lake Gaston has approximately 60,000 acre-feet of storage between 200' msl and 197' msl.

c) The applicant utilizes one foot of storage for normal operation between 200' msl and 199' msl.

Once above conditions are met, Lake Gaston storage shall be used to augment the downstream flow to adhere to the FERC minimum flow, per direction of DWQ.

Once Lake Gaston reaches 197' msl, flow augmentation shall cease and flow entering the project from Kerr Lake shall equal the flow leaving the Roanoke Rapids dam, after accounting for consumptive withdrawals, evaporation and inflows to Lake Gaston and Roanoke Rapids Lake.

When the USACE weekly declaration begins to exceed the Roanoke Rapids dam drought minimum flows, the applicant shall allow Lake Gaston to refill to 199.5' msl prior to:

a) exceeding drought minimum flow at the Roanoke Rapids dam and,

b) starting to operate the Roanoke Rapids project in a hydropower peaking mode.

The applicant shall implement these conditions only upon consultation with and direction from the USACE and DWQ.

3.5 *Downstream Water Quality Monitoring* –

The applicant shalt fund three of the current USGS continuous water quality monitoring stations for dissolved oxygen and temperature at Halifax, Oak City and Jamesville. These stations shall be operated continuously throughout the year.

The applicant shall provide funding annually by March 1st of each year to DENR.

The stations shall be monitored to document that dissolved oxygen levels in the Roanoke River, as a result of the drainage of water from the floodplain resulting from project operations, equals or exceeds the instantaneous dissolved oxygen standard and mean, daily dissolved oxygen standards in effect as of the date of the discharge in the mainstem river (15A NCAC 2B .0211(3)(b)). This concentration shall be calculated using all available daily data or as (at least) the mean of 24, hourly instantaneous analyses.

At such time DWQ establishes that the applicant's operations do not or no longer affect downstream water quality, applicant funding shall no longer be required.

If funding is discontinued in accordance with this Condition and subsequent applicant operational changes enable DWQ to demonstrate that water quality monitoring is again necessary, the applicant's funding requirement shall

be reinstated. The study period shall be mutually agreed upon by the applicant, DWQ and WRC.

Data shall be forwarded to the Wetland/401 Unit, the Ecosystems Unit and the Raleigh and Washington Regional Offices of DWQ every other month (bi-monthly) from November 1 through May 31 and monthly from June 1 through October 31. Data must be submitted electronically. Data must include all available parameters collected by the USGS (e.g. stage or flow) in addition to: site, date, time, depth, dissolved oxygen concentrations (mg/L.), and water temperature (oC). In the event of emergency water quality conditions, the applicant shall cooperate in good faith with DWQ and WRC to take such reasonable steps to protect the water quality of the Roanoke River below the Roanoke Rapids dam.

The applicant, DWQ and WRC shall mutually agree upon a method of evaluating data collected within the first year of monitoring. Data evaluation shall occur on a five-year cycle.

If during water quality data evaluation, DWQ (in consultation with WRC) finds that scientific data establish a causal link between the applicants rescheduling of the USACE's weekly declaration and the reduction of water quality in the mainstem river below State standards, the applicant with concurrence of DWQ and WRC shall identify and implement operational changes that will significantly reduce the applicant's water quality impacts.

Each operational change implemented according to the preceding paragraph must reduce the

applicant's rescheduling of the USACE weekly declaration by a proportional amount equivalent to 5 divided by the period of the new FERC license in years. Thus, if as the result of monitoring, the applicant implements a change to reduce its rescheduling of the USACE weekly declaration at the end of each monitoring cycle, by the end of the last monitoring cycle, each day the applicant shall release one seventh of the USACE weekly declaration. The exact means for calculating the proportionality of steps will be determined by DWQ in consultation with WRC and the applicant.

The applicant's flexibility for scheduling releases during a peaking day is not constrained by this condition.

The applicant is not required by this Certification to make modifications to the USACE weekly declaration.

The maximum operational duty of the applicant under this Condition is reached when the daily water flow through the Roanoke Rapids dam equals one-seventh of the USACE weekly declaration as long as this flow does not conflict with the requirements of condition 3.4 above.

4 Reporting of Consumptive Uses –

The applicant shall identify and report in writing existing and proposed consumptive uses to DWQ and the NC Division of Water Resources ("DWR"). The applicant shall report the existing or projected (as appropriate) average consumptive withdrawal and maximum capacity for each withdrawal. The applicant shall report existing consumptive uses to DWQ and DWR within 60 days of the acceptance of the new

FERC license and shall report proposed new or expanded consumptive uses to DWQ and DWR within 30 days of receiving a request for the proposed new or expanded withdrawal and before submitting any requests to FERC. Conditions 4 through 7 of this Certification apply to large consumptive uses, but not exclusively.

5 Conservation and Drought Management –

In anticipation of low flow conditions, such as occur during critical droughts, the applicant shall take actions as described in this Certification to ensure that sufficient water of adequate quality is and will be available to assure compliance with State water quality standards and other appropriate requirements of State law. In furtherance of the purposes of this condition, article FL6, section 3 of the Technical Settlement (Appendix B) of the Settlement Agreement ("FL6 § 3"), is made part of this Certification as if set forth fully herein. Any amendment to FL6 § 3 shall not become a part of this Certification except through the procedures set forth in condition 7. The applicant shall take all actions specifically required of the applicant by FL6 § 3 and shall take all other necessary actions within its authority to implement FL6 § 3.

6 No Rights Granted –

This Certification does not grant or affirm any property right, license or privilege in any waters or any right of use in any waters. This Certification does not authorize any person to interfere with the riparian rights, littoral rights or water use rights of any other person, and this Certification does not create any prescriptive right or

any right of priority regarding any usage of water. No person shalt interpose this Certification as a defense in any action respecting the determination of riparian or littoral rights or other water use rights. No consumptive user is deemed by virtue of this Certification to possess any prescriptive or other right of priority with respect to any other consumptive user regardless of the quantity of the withdrawal or the date on which the withdrawal was initiated or expanded. This Certification issues on the express understanding of DENR that, pursuant to Federal Power Act section 27, 16 U.S.C. § 821, the new FERC license does not establish or determine a proprietary right to any use of water. It establishes the nature of the use to which a proprietary right may be put under the Federal Power Act.

7 Continuing Compliance –

The applicant shall conduct its activities in a manner consistent with State water quality standards (including any requirements resulting from compliance with section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d)) and any other appropriate requirements of State law and federal law. If DWQ determines that such standards or laws are not being met (including the failure to sustain a designated or achieved use or to comply with any new or amended water quality standards or other appropriate requirements of State or federal law) or that State or federal law is being violated, or that further conditions are necessary to assure compliance, DWQ may reevaluate and modify this Certification to include conditions appropriate to assure compliance with such standards and requirements in accordance with 15A NCAC

2H.0507(d). Before modifying the Certification, DWQ will notify the applicant and FERC, provide public notice in accordance with 15A NCAC 2H.0503 and provide opportunity for public hearing in accordance with 15A NCAC 2H.0504. Any new or revised conditions will be provided to the applicant in writing, will be provided to the USACE for reference in any permit issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344, for the project, and shall also become conditions of the new FERC license for the project. This condition shall constitute "reserved authority" as that term is used in Section 9.2 of the Settlement Agreement. The conditions of this Certification are not modified or superseded by any condition or article of the new FERC license.

8 Definitions/Glossary of Terms –

The listed terms are definitions utilized throughout this Certification unless otherwise specified in specific conditions of the Certification.

cfs – (Cubic feet per second) – Volume of one cubic foot of water passing a given point in one second.

Day – The 24 hour period from midnight to midnight.

Diadromous Fish – Fish that live as adults in a salt water system and spawn in a fresh water system (anadromous) or fish that live as adults in fresh water and spawn in salt water (catadromous).

Drought Declaration – For the purpose of this settlement agreement, a declared drought

is whenever the USACE activates the Drought Advisory Committee.

Electrical Demand Emergency – A condition of the applicant's power grid that potentially would lead to reduction in voltage (brownouts) or removing alternating customers from electrical service (rolling black-outs) because demand exceeds production within the applicants service area.

Flood Control – The controlled release of water from the USACE Kerr dam when the level in Kerr Reservoir is in or above Zone E of the guide curve.

Instantaneous Flow – The flow in cfs passing a point at a particular instant.

Kerr Dam (Buggs Island Dam) – The dam on the Roanoke River immediately upstream of the Gaston dam, forms Kerr Lake federally owned and operated by the USACE.

mg/L (milligrams per liter) – An expression of chemical concentration of matter (solid, liquid or gas) dissolved in a liquid (usually water).

Minimum Flow and Target Flow – Unless otherwise stated, minimum flow and target flow shall refer to the sum of the instantaneous releases made by the applicant from Roanoke Rapids dam.

MWH (megawatt hour) – A unit of measure for the production of electricity equal to 1 million watts for one hour.

Peaking Day – Any day when the amount of water released by the applicant from the Roanoke Rapids dam exceeds the daily mean of the

USACE weekly declaration by 1000 cfs averaged over the day.

Peaking Period – Any two-hour period when the mean rate of release in cfs exceeds the hourly mean of the daily release by 2500 cfs or more, or as modified as per section 3.2.

ppm (parts per million) – An expression of chemical concentration of matter (solid, liquid or gas) dissolved in a liquid (usually water). One ppm = one mg/L.

Settlement Agreement – The "Comprehensive Relicensing Settlement Agreement for the Roanoke Rapids and Gaston Dam Project, FERC Project No. P-2009," effective July 2003.

USACE Weekly declaration – The total amount of water the USACE allocates for release in one week, plus additional water (energy) utilized by the applicant or Progress Energy from their storage accounts, including adjustments the USACE may make during the week. The declaration may be referred to in either power (MWH) or flow (cfs) units. When compared to or used to define minimum flow or target flow, the weekly declaration shall be net of evaporation, consumptive uses and local inflows into Lake Gaston and Roanoke Rapids Lake, except that water withdrawals shall not be considered consumptive uses to the extent they are supported by the release of water from dedicated storage in Kerr Reservoir.

Week – The period of 7 days covered by the weekly declaration of the Corps, currently, Saturday 0000 hours through Friday 2400 hours.

Weekly Declaration Flood (WDFlood) – any flood plain inundation that results (or would

result) from a USACE weekly declaration of flood control releases whether or not the applicant releases peaking flows during the week.

Within-day Peaking – Any day with one or more peaking periods.

Within-week Peaking – Any week with one or more peaking days.

Violations of any condition herein set forth may result in revocation of this Certification and may result in criminal and/or civil penalties or other enforcement action. This Certification shall become null and void unless the above conditions are made conditions of the FERC Permit This Certification shall expire upon expiration of the FERC permit.

If this Certification is unacceptable to you, you have the right to an adjudicatory hearing upon written request within sixty (60) days following receipt of this Certification. This request must be in the form of a written petition conforming to Chapter 150B of the North Carolina General Statutes and filed with the Office of Administrative Hearings, P.O. Box 27447, Raleigh, N.C. 27611-7447. If modifications are made to an original Certification, you have the right to an adjudicatory hearing on the modifications upon written request within sixty (60) days following receipt of the Certification. Unless such demands are made, this Certification shall be final and binding.

This the 30th day of July 2003
DIVISION OF WATER QUALITY

/s/ [illegible]
Alan Klimek, P.E., Director

Certification Number 3208

Certificate of Completion

DWQ Project No.: 02-0919 County: Halifax and other adjacent counties

Applicant: Dominion North Carolina Power

Project Name: Roanoke Rapids and Lake Gaston FERC Project

Date of issuance of 401 Water Quality Certification: July 30, 2003

Upon completion of all work approved within the 401 Water Quality Certification or applicable Buffer Rules, and any subsequent modifications, the applicant is required to return this certificate to the 401/Wetlands Unit, North Carolina Division of Water Quality, 1621 Mail Service Center, Raleigh, NC, 27699-1621.This form may be returned to DWQ by the applicant, the applicant's authorized agent, or the project engineer. It is not necessary to send certificates from all of these.

Applicant's Certification

I, _____, hereby state that, to the best of my abilities, due care and diligence was used in the observation of the construction such that the construction was observed to be built within substantial compliance and intent of the 401 Water Quality Certification and Buffer Rules, the approved plans and specifications, and other supporting materials.

Signature: _____ Date: _____

Agent's Certification

I, _____, hereby state that, to the best of my abilities, due care and diligence was used in the observation of the construction such that the construction was observed to be built within substantial compliance and Intent of the 401 Water Quality Certification and

Buffer Rules, the approved plans and specifications, and other supporting materials.

Signature: _____ Date: _____

If this project was designed by a Certified Professional

I, _____, as a duly registered Professional _____ (i.e., Engineer, Landscape Architect, Surveyor, etc) in the State of North Carolina, having been authorized to observe (periodically, weekly, full time) the construction of the project, for the Permittee hereby state that, to the best of my abilities, due care and diligence was used in the observation of the construction such that the construction was observed to be built within substantial compliance and intent of the 401 Water Quality Certification and Buffer Rules, the approved plans and specifications, and other supporting materials.

Signature: _____ Registration No. _____ Date _____